

Office Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

ARKANSAS-BEST FREIGHT SYSTEM, INC.
EAST TEXAS MOTOR FREIGHT LINES, INC.
GILLETTE MOTOR TRANSPORT, INC.
WESTERN TRUCK LINES, LTD.

AND

REGULAR COMMON CARRIER CONFERENCE
OF AMERICAN TRUCKING ASSOCIATIONS, INC.
Appellants

v.

ELVIN L. REDDISH, ET AL.

Appellees

**On Appeal from the United States District Court for the
Western District of Arkansas—Ft. Smith Division**

JURISDICTIONAL STATEMENT

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**On Appeal from the United States District Court for the
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Arkansas is reported at 188 F. Supp. 160. The decision of Division 1 of the Interstate Commerce Commission appears at 81 M.C.C. 35. Because both the foregoing are relatively long and since they are set forth as Appendix A and Appendix C, respectively, to the Jurisdictional Statement being concurrently filed with this Court by the Interstate Commerce Commission

following its notice of appeal of the decision below, we respectfully ask leave to treat these decisions thus filed as if incorporated herein. Petition for reconsideration of the Division 1 report and order having been denied by order of the entire Commission dated December 16, 1959, the Division 1 report and order stands as the final decision of the Commission. The denial order of the entire Commission is attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 USC §§ 1336, 1398, 2284 and 2321 through 2325 inclusive, to set aside the order of the Interstate Commerce Commission. The judgment of the district court attached as Appendix B, was entered on October 19, 1960, and notice of appeal was filed in that court by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., on December 16, 1960.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of the Court to review the judgment on direct appeal in this case:

Frozen Food Express, Inc. v. U.S., 351 U.S. 40; *American Trucking Associations, Inc., et al. v. Frisco Transportation*, 358 U.S. 133; and *American Trucking Associations, Inc., et al., v. U.S., et al.*, 364 U.S. 1.

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding Section 1, and Sections 203(a)(15) and 209(b) of the

Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309 (b) are set forth verbatim in Appendix C.

QUESTIONS PRESENTED

1. Whether under the 1957 Amendments to Section 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon supporting shippers of a grant or denial of contract carrier rights.

2. Whether the district court erred in holding that the Commission, in determining whether issuance of a permit under Section 209(b) is consistent with the public interest and the National Transportation Policy, is required to consider the lower rates proffered by a contract carrier applicant, even assuming the evidence of record before the Commission will support a finding that the lower rates result from economies and advantages inherent in the contract carrier's operation.

3. Whether the district court when substituting its judgment for that of the Interstate Commerce Commission in weighing the evidence of record erred in concluding that the supporting shippers required a special service not provided by common carriers.

STATEMENT

Although this proceeding is closely related to *J-T Transport Co., Inc. v. United States of America and Interstate Commerce Commission*, 185 F. Supp. 838 (Notice of Appeal in which was filed October 7, 1960)¹ distinct and crucial questions have been injected here which are not before this Court in the *J-T* case.

¹ Because of the inter-relation of legal issues in this case and in *J-T*, we respectfully suggest that the Court may wish to consolidate these cases for joint disposition.

On May 13, 1958, Elvin L. Reddish filed his application to institute permanent motor contract carrier service transporting canned goods from Springdale, Lowell and Ft. Smith, Arkansas, and Westville, Oklahoma, to virtually all points in thirty-three states and transporting canned goods and materials and supplies used in the manufacture of canned goods between substantially the same points in the reverse direction. The application was actively opposed by a large number of motor common carriers, including these motor common carrier appellants, as well as by many railroads. Jones Truck Line, Inc., contrary to the opinion of the court below at 188 F. Supp. 162, took no part in the proceeding.

The service to be performed by Reddish would be for and under continuing contracts with Steele Canning Company of Springdale, Arkansas; Keystone Packing Company, Ft. Smith, Arkansas; and Cain Canning Company, Inc., Springdale, Arkansas. Reddish holds no certificate or permit issued by the Interstate Commerce Commission other than a temporary authority permit to serve the Steele Canning Company, rendering a portion of the service for which permanent authority is sought in this proceeding.

Contrary to the opinion of the court below at 188 F. Supp. 162, the Reddish application is not limited to the transportation of less-than-truckload shipments, although Mr. Reddish under temporary authority published a rate schedule or a tariff which offered less-than-truckload service (R. 67-72)² at rates approximately equal to motor common carrier truckload rates (R. 457) and substantially below appellant carriers' less-than-truckload rates. (R. 227) The dissatisfaction of supporting shippers with existing common carrier service is directed almost wholly at the rates assessed by these protesting motor common carriers

² "R" indicates pages in the hearing transcript of testimony.

on less-than-truckload shipments of canned goods. No other substantial claim of inadequacy in existing service was voiced by supporting shippers, although there was shipper testimony, unsupported by documentary evidence, that use of motor common carrier service resulted in delayed shipments. The Hearing Examiner found³ as a fact that:

"It (Steele) is obtaining satisfactory service from the existing motor common carriers on straight truckload shipments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stop-offs for delivery of a portion of the freight at one or two points en route to final destination." (Appendix D, Page 31)

The Commission, Division 1, as was its duty, weighed the evidence of record, considered the Examiner's report, and upon the foregoing subject reached the following conclusion at 81 M.C.C. 42:

"There has been no convincing showing by applicant that the supporting shippers have a real need for the proposed contract carrier service. On the contrary, the only serious complaint which shippers have against existing service is with the less-than-truckload rates of motor common carriers. Even should the application be granted, they assert, they will continue to use common carrier service to some extent. It may be fairly concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates."

Steele, the principal supporting shipper, has used the services of Jones Truck Lines, Inc., Arkansas-Best Freight System, Inc., England Bros. Truck Line, Campbell's "66" Express, M & A Transportation Company and Frisco Transportation Company (R. 139) (and probably that of connecting carriers with whom it is not familiar), all of

³ Examiner's report attached as Appendix D.

which are motor common carriers. Steele intends to continue the use of motor common carriers (R. 141, 237).

Reddish proposed no specialized or distinct service which would be materially different from that offered by existing motor common carriers, and the record before the Commission fails to disclose any need for a specialized service. Both Reddish and protestant motor common carriers operate tractors with van semitrailers. Each offers a less-than-truckload service, i.e., each will transport a relatively small shipment from one consignor to one consignee. If this authority is granted as sought, each would be authorized—as are already the protestants—to render truckload service, i.e., one relatively large shipment of a specified minimum volume, from one consignor to one consignee. Each would be authorized to render a truckload service with stopping-in-transit for partial unloading privileges, i.e., a large shipment from one consignor to a very limited number of different consignees at different locations, with a truckload rate being assessed plus an additional stopping-in-transit charge. Thus the service of the contract carrier, Reddish, would be practically identical to that of the common carriers.

In the actual use of his tariff filed for the temporary operation Reddish, in practice, offered several stops in transit at the truckload rate and assessed no stopping-in-transit charge, thus rendering a service tantamount to less-than-truckload service at truckload rates.

Reddish does not propose to dedicate equipment to the exclusive use of any particular shipper (R. 102-103). In fact, there was no showing of any specialized type of service to distinguish applicant from existing motor common carriers; only his lower level of rates, which result in a cut-rate service to the supporting shippers, distinguishes him from motor common carrier appellants.

There is not a scintilla of evidence in the record before the Commission which would even remotely establish that

the cut-rate service is made feasible through a more economical operation by Reddish. The record is totally silent on the operating costs of any carrier party to the proceeding.

The Hearing Examiner in his recommended report proposed that the application be granted. Numerous protestants filed exceptions to which Reddish replied. Division 1 concluded that the application should be denied in its entirety, this decision appearing, as noted, at 81 M.C.C. 35. The entire Commission unanimously accepted the Division 1 report and denied applicant's petition for reconsideration by order dated December 16, 1959. The Contract Carrier Conference of American Trucking Associations, Inc., by the same order was granted intervention in support of Reddish, and the Regular Common Carrier Conference of American Trucking Associations, Inc., was granted intervention in support of the protesting common carriers.

Reddish, supported by the Contract Carrier Conference, filed its complaint in the United States District Court for the Western District of Arkansas, Fayetteville Division, on January 27, 1960, attacking the Commission's final order. These appellants were allowed to intervene in support of the defendant. The matter was subsequently transferred to the Ft. Smith Division which rendered its decision on October 19, 1960. This decision, reported at 188 F. Supp. 160, sets aside the report and order of the Commission and remands the cause to the Commission for further proceedings. Subsequently, the Interstate Commerce Commission and these appellants filed their respective notices of appeal to this Court.

THE QUESTIONS ARE SUBSTANTIAL

This proceeding, like that in *J-T Transport, Inc. v. United States of America and Interstate Commerce Commission*, supra, is a case of first impression interpreting

amendments enacted in 1957 to the Interstate Commerce Act. Both require interpretation of the requisite standards of proof necessary to acquire a contract carrier permit under that Act. This proceeding, however, involves specific pronouncements of law in addition to those decided in the *J-T* case, and which are diametrically opposed to long standing Commission policy.

The decision of the court below reverses a cardinal principle adhered to by the Commission since 1937, known to Congress in 1957, but a principle in no way modified by Congress in the amendments of that year. The impact of the lower court's decision will be felt by every regulated for-hire interstate motor carrier within the Commission's jurisdiction because it holds that the Commission must give favorable consideration to a contract carrier applicant's willingness to provide transportation at lower rates even though the services of existing common carriers are entirely adequate and are offered at rates within the rate requirements of the Interstate Commerce Act. In the field of rates, the decision of the court below can lead only to destructive competition among the various motor carriers and a material weakening of the national transportation system, whose strength Congress has charged the Commission with the responsibility of fostering. This the court below has done without benefit of any judicial precedent or legislative mandate; indeed, even without support of facts of record.

1. The first question presented is whether under the 1957 amendments to Section 209(b) of the Interstate Commerce Act the district court was in error in holding that adequacy of existing service may not be considered by the Interstate Commerce Commission in evaluating the effect upon existing carriers of a grant or denial of contract carrier rights. In this proceeding, as in the *J-T* case, *supra*, it is imperative that the Court review and reverse the holding of the court below on this point.

Whether the principle is termed an "adequacy of existing service" test, a "willingness and ability" test, or by some other name, the Commission still must be allowed to consider the service which the shipper would use in the event a contract carrier application is denied. Section 209(b) now provides that the Commission shall consider "the effect which denying the permit would have upon the applicant and/or its shipper."

How can the Commission determine the effect of a denial upon a shipper except by studying the service which the shipper would then be forced to use? In this proceeding denial would force the shippers to use private carriage or common carriage, there being no other alternate service. Would the use of common carrier service adversely affect the shipper? It would not if that service is "adequate" to meet the shippers' needs. This is the "adequacy of existing service" test and is clearly included in the 1957 amendments. The Commission has not here held that the "adequacy of service" test is the sole criterion to be considered, but has rightly held, as in the *J-T* case, *supra*, that this test is still a valid consideration. It is not exclusive, but it is valid.

The protection of "adequate" existing service from excessive competition is vital to the entire for-hire motor carrier industry, both common and contract. The 1957 amendments were made specifically to protect motor common carriers. On this point the Senate Committee charged with responsibility for the legislation said:

"Your committee is of the opinion that the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, in the light of the objectives of the national transportation policy, require that the bill, as amended, be passed."⁴

⁴ S. Rep. No. 703, 85th Congress, 1st Session (1957) p. 7.

The decision of the court below is diametrically opposed to the stated purpose of the 1957 amendments because it opens the door to unlimited competition regardless of the adequacy, willingness, ability, even eagerness of common carriers to provide the required service to the shipper.

2. Under Section 216 of the Interstate Commerce Act, 49 U.S.C. Sec. 316, common carriers are required to publish and assess reasonable rates which are not unduly prejudicial or preferential to any shipper. Aggrieved shippers may file their complaint with the Interstate Commerce Commission which has the jurisdiction to require removal of unlawful rates. None of the supporting shippers herein have filed a complaint action against the existing rates of motor carrier appellants in this proceeding (R. 440, 459). Supporting shippers have chosen an improper remedy, as the Commission correctly held, saying:

"It may fairly be concluded, we believe, that their support of this application rests entirely upon a desire to obtain lower rates. This is not a sufficient basis to justify a grant of authority to a new carrier. If the shippers believe that the rates of presently authorized carriers are unjust or unreasonable, they should seek relief in actions against these carriers under appropriate provisions of the Act." 81 M.C.C. 35, at 42-43.

The rule of law is not of recent origin. It was pronounced by the Commission at least as early as April, 1937, in *Wellspeak Common Carrier Application*, 1 M.C.C. 712. It has been applied to contract carrier applications. *Dixon & Koster Contract Carrier Application*, 32 M.C.C. 1.

The court below, without citation to any judicial precedent, holds that the 1957 enactments require the Commission to overturn this long established principle even though the question is not even mentioned in those amendments or in Senate Report No. 703 and obviously was

given no consideration by Congress in connection with the proposed revisions to Section 209 of the Act. The court ruled at 188 F. Supp. 167:

"Our holding is that where the lower rates result from economies and advantages inherent in contract carrier operation, as they do in this instance, and there is a showing that efficient business operation requires the proposed tailored service—including the lower rates, as is reflected by the record in this instance, the Commission may not disregard this evidence in its evaluation of the effect of a denial of the permit upon the applicant's supporting shippers. Mere cost-cutting or profit-shaving need not be considered, perhaps, but evidence of efficient operation must be heeded."

There is no evidence of efficient operation on the part of Reddish in this record. There is no evidence of comparative costs of operation between Reddish and motor common carriers. Not only does the court below reverse a long standing administrative principle but also it substitutes its judgment for that of the Commission and renders a conclusion totally without support in the evidence of record. Moreover, appellants submit that the only source of the court's conclusion that Reddish can operate more economically than common carriers must be the brief filed before the court by the Department of Justice which at page 13 cites certain textbooks on motor transportation.

While the manner in which motor carriers can become cut-rate operators is well shown by the Commission's decision in *M. B. Johnson Common Carrier Application*, 18 M.C.C. 194, appellants, nevertheless, urge that there is no evidence of record sufficient here to allow the Commission or the court to ascertain just what the Reddish operation costs Reddish. The court below errs, we urge, when it holds that the low rates of Reddish result from "economies and advantages inherent in contract carrier operation."

Of more importance to the regulated for-hire motor carrier industry, however, is the holding of the court that the Commission must give consideration under the amended Section 209 to lower rates proffered by a contract carrier applicant. Consideration in a Section 209 proceeding of the level of rates applicable to existing service must inevitably result in a substantial broadening of issues with consequent delay in the issuance of a final order by the Commission. Worse yet, it will encourage destructive competition because the shipper's constant quest for lower transportation costs will be translated into duplicative, competitive service. If Steele Canning Company here is successful in securing the service of Reddish merely because Reddish offers lower-rated service, what is there to protect Reddish from future competition at the hands of a still more ruthless rate-cutter?

The Commission, in its wisdom, has for almost twenty-five years held that shippers dissatisfied with an existing scale of rates should attack that scale of rates directly rather than attempt to circumvent the scale by supporting the institution of new competitive for-hire service. It is imperative to the for-hire motor carrier industry that the right of the Commission to continue this rule—in the total absence of Congressional mandate to the contrary—be upheld, and it is significant that the Contract Carrier Conference in the court below gave Reddish no support on this point. The statutory provisions for adjudicating rates need not be thrown into the discard.

3. While it is true that a major area of contention between the parties lies in the third and fourth criteria of Section 209(b), there assuredly is contention also over the second criterion, "the nature of the service proposed." The court below held at 188 F. Supp. 164 that there was no contention between the parties on this point, notwithstanding the argument of these appellants at pages 26 through 31 of their brief to that court. Reddish has not

proposed, nor do the supporting shippers need, a distinctive or specialized service as was properly concluded by the Commission at 81 M.C.C. 41. Reference to this portion of the Division 1 report clearly rebuts the following statement of the court below:

"Even if it is assumed that some adverse effect would result from the granting of this permit, no consideration was given to the special services which could not be supplied by a common carrier." (188 F. Supp. 167)

Thus the court ignores a significant paragraph in the Division 1 report and substitutes its judgment for that of the Commission, implying by its quotation of the *J-T* decision that there *has* been proposed a *specialized* service designed to meet the *distinct* need of the supporting shippers.

The Commission, not the court, has been empowered by Section 209(b) to consider "the nature of the service proposed", and a reviewing court exceeds its proper function when it does other than ascertain whether the Commission has fairly considered "the nature of the service proposed." *Gray v. Powell*, 314 U.S. 402, 72 S. Ct. 326. Thus there is disagreement not only between the parties on this second criterion but also between the Commission and the court.

The irony of the conflict is apparent when the conclusion of the Senate Committee reporting on S. 1384—which became the amendment at issue—is recalled:

"The present law has proved inadequate to maintain proper distinctions between common and contract carriage. It has made difficult in this area of regulation, of obtaining the objectives of the national transportation policy. The decision of the Supreme Court in *United States v. Contract Steel Carriers* points out clearly a need for a change in the statute."^a

^a S. Rep. 703, 85th Congress, 1st Session (1957).

If the decision of the court below is allowed to stand, has the law been cleared of confusion or has the confusion merely been compounded? Shall the Commission determine whether there has been proposed a *specialized* service designed to meet the distinct needs of the supporting shipper or shall the reviewing court make this determination? Proper administration of the Act requires, we submit, that the Commission, exercising its expertise, make this critical and often difficult determination.

CONCLUSION

The questions presented by this appeal are substantial and of such public importance as to require plenary consideration, with briefs and oral argument for their resolution.

Respectfully submitted,

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February 14, 1961

CERTIFICATE OF SERVICE

I, Roland Rice, one of the attorneys for Appellants Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines, Inc., Gillette Motor Transport, Inc., Western Truck Lines, Ltd., and Regular Common Carrier Conference of the American Trucking Associations, Inc., and member of the Bar of the Supreme Court of the United States, hereby certify that on the 14th day of February, 1961, I served copies of the foregoing Jurisdictional Statement to the Supreme Court of the United States on the several parties as follows:

1. On the United States, by mailing copies, duly addressed and postage prepaid, to Hon. Archibald Cox, The Solicitor General, Department of Justice, Washington 25, D. C., W. Wallace Kirkpatrick, Acting Assistant Attorney General, Department of Justice, Washington 25, D. C., Richard H. Stern, Attorney, Department of Justice, Washington 25, D. C., and Charles W. Atkinson, United States Attorney, Ft. Smith, Arkansas, air mail postage prepaid.

2. On the Interstate Commerce Commission, by mailing copies duly addressed and postage prepaid, to Robert W. Ginnane, General Counsel, Interstate Commerce Commission, and to Arthur J. Cerra, Assistant General Counsel, Interstate Commerce Commission, at their offices in Washington, D. C.

3. On Elvin L. Reddish, plaintiff herein, by mailing copies in duly addressed envelopes, air mail, postage prepaid, to John H. Joyce, 26 North College, Fayetteville, Arkansas, and by first class mail, postage prepaid, to A. Alvis Layne, Pennsylvania Building, Washington 4, D. C., its attorneys.

4. On the intervening plaintiffs herein, by mailing copies in duly addressed envelopes, to their respective attorneys of record, as follows:

With air mail postage prepaid, to Clarence D. Todd, Esq., 1825 Jefferson Place, N. W., Washington, D. C. and with air mail postage prepaid, to John H. Joyce, 26 North College, Fayetteville, Arkansas.

5. On other intervening defendants herein by mailing copies in duly addressed envelopes to their respective attorneys of record, as follows:

With air mail postage prepaid, to George F. Gunn Jr., Esq., Suite 1230 Boatmen's Bank Building, St. Louis 2, Missouri, E. L. Ryan, Jr., Esq., Chicago, Rock Island and Pacific Railroad Company, LaSalle St. Station, 139 West Van Buren St., Chicago 5, Illinois, and to Heartsill Ragon, Esq., and H. P. Warner, Esq., Suite 522, Merchants National Bank Building, Ft. Smith, Arkansas.

ROLAND RICE
Of Counsel for
Appellants named herein.

APPENDIX A

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 16th day of December A. D. 1959

No. MC-117391

E. L. REDDISH CONTRACT CARRIER APPLICATION
(Springdale, Ark.)

Upon consideration of the record in the above-entitled proceeding, and of:

- (1) Petition of Contract Carrier Conference of the American Trucking Associations, Inc., dated August 14, 1959, for leave to intervene.
- (2) Petition of Regular Common Carrier Conference of the American Trucking Associations, Inc., dated September 17, 1959, for leave to intervene.
- (3) Petition of applicant filed August 14, 1959, for reconsideration and oral argument.
- (4) Petition tendered August 14, 1959, by the Contract Carrier Conference of the American Trucking Associations, Inc., for reconsideration.
- (5) Reply dated September 2, 1959, by Watson Bros. Transportation Co., Inc., protestant, to petitions in (3) and (4) above.
- (6) Joint reply dated September 4, 1959, by Wright Motor Lines, Inc., Loving Truck Lines, Buckingham Transportation, Inc., Buckingham Express, Inc., Buckingham Transfer, Inc., and Buckingham Transportation, Inc., as operator of Des Moines Transportation Company, Inc., protestants, to the petitions in (3) and (4) above.

- (7) Joint reply filed September 14, 1959, by Southwest Railroad Association, Class I Rail Carriers in Western Trunkline Territory, protestants, to petitions in (3) and (4) above.
- (8) Joint reply dated September 16, 1959, by Arkansas-Best Freight System, Inc., East Texas Motor Freight Lines Inc., Herrin Transportation Company, Gillette Motor Transport, Inc., and Western Truck Lines, Ltd., protestants to petitions in (3) and (4) above.
- (9) Tendered reply dated September 17, 1959, by the Regular Common Carrier Conference of the American Trucking Associations, Inc., to petitions in (3) and (4) above.
- (10) Reply dated September 21, 1959, by L. A. Tucker Truck Lines, Inc., protestant, to petitions in (3) and (4) above.

It is ordered, That petitioners in (1) and (2) above be, and they are hereby permitted to intervene in said proceeding with the right to appear and participate in all further proceedings therein;

It is further ordered, That the tendered petition in (4) above and the tendered reply in (9) above be, and they are hereby, accepted for filing;

It is further ordered, That the petitions in (3) and (4) be, and they are hereby, denied for the reasons (a) that the findings of Division 1 are in accordance with the evidence and the applicable law, and (b) that no sufficient cause appears, for reopening the proceeding for reconsideration or for oral argument.

By the Commission.

HAROLD D. MCCOY,
Secretary.

(SEAL)

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION**

Civil Action No. 1531

ELVIN L. REDDISH, PLAINTIFF

v.

**UNITED STATES OF AMERICA and INTERSTATE COMMERCE
COMMISSION, DEFENDANTS**

**CONTRACT CARRIER CONFERENCE OF AMERICAN TRUCKING
ASSOCIATIONS, INC., INTERVENING PLAINTIFF**

**L. A. TUCKER TRUCK LINES, INC.,
ORSCHELN BROS. TRUCK LINES, INC.,
ARKANSAS-BEST FREIGHT SYSTEM, INC.,
EAST TEXAS MOTOR FREIGHT LINES, INC.,
GILLETTE MOTOR TRANSPORT, INC.,
WESTERN TRUCK LINES, LTD.,
REGULAR COMMON CARRIER CONFERENCE OF
THE AMERICAN TRUCKING ASSOCIATIONS, INC.,
ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY,
AND 31 OTHER CLASS I RAIL CARRIERS IN
WESTERN TRUCK LINE TERRITORY**

INTERVENING DEFENDANTS

**BEFORE MATTHES, Circuit Judge, and MILLER and YOUNG,
District Judges.**

This opinion prepared by Judge Young and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the
orders of the Interstate Commerce Commission involved**

here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.

This October 19, 1960.

/s/ M. C. MATTHES
Circuit Judge

/s/ JNO. E. MILLER
District Judge

/s/ GORDON E. YOUNG
District Judge

APPENDIX C

National Transportation Policy

"[September 18, 1940.] [49 U.S.C., preceding §§ 1, 301, 901, and 1001.] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

DEFINITIONS

Section 203(a)(15) of the Interstate Commerce Act

"(15) The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of

motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

PERMITS FOR CONTRACT CARRIERS BY MOTOR VEHICLE

Section 209(b) of the Interstate Commerce Act

"(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at

the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204 (a) (2) and (6): *Provided*, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further*, That no terms, conditions, or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203 (a) (15), as in force on and after the effective date of this proviso."

APPENDIX D**INTERSTATE COMMERCE COMMISSION****Served Jan. 2, 1959****NOTICE TO THE PARTIES**

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. The stated specific time periods apply to all parties and give full effect to Rule 1.21(c) of the General Rules of Practice to the extent, if any, the provisions of such rule otherwise would be applicable to this proceeding.

Any new operation to be authorized by the recommended order herein if it becomes effective may not be commenced until such time as the certificate, permit, or license has actually been issued. The certificate, permit, or license will not be issued until the applicant has complied with the provisions of the Interstate Commerce Act and the requirements of the Commission thereunder. It should not be assumed that the recommended order has become effective as the order of the Commission until a notice to that effect, signed by the Secretary of the Commission, has been received.

No. MC-117391

E. L. REDDISH CONTRACT CARRIER APPLICATION

Decided

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, of specified commodities, (1) from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in 33 States, and (2) from points in 30 States to Springdale, Lowell, Fort Smith, and Westville, found consistent with the public interest and the national transportation policy. Issuance of a permit approved upon compliance by applicant with certain conditions, and application in all other respects denied.

John H. Joyce and A. Alvis Layne for applicant.

John C. Ashton, Edward G. Bazelon, Carl V. Kretzinger, J. Max Harding, Hugh T. Matthews, E. L. Ryan Jr., J. W. Durdan, Roy L. Eyster, Jerry Presbridge, Marion F. Jones, Gerald A. Orschein, Vernon M. Masters, Thomas D. Boone, G. F. Gunn, Jr. and Chester G. Hayes, Jr., for protestants.

REPORT AND ORDER

RECOMMENDED BY H. L. HANBACK, HEARING EXAMINER

By application filed May 13, 1958, as amended, E. L. Reddish, of Springdale, Ark., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) of canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minne-

sota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis), Texas (not including Dallas and Fort Worth), Virginia, West Virginia, and Wisconsin, and (2) of canned goods, and materials and supplies used in the manufacture of canned goods, from points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois (not including Chicago for articles other than metal cans and lids), Indiana, Iowa, Kansas (not including Wichita), Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri (not including St. Louis, Kansas City, Springfield and Joplin), Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma (not including Oklahoma City and Tulsa), Pennsylvania, Tennessee (not including Memphis for articles other than boxes), and Texas (not including Dallas and Fort Worth), to Springdale, Lowell, and Fort Smith Ark., and Westville, Okla.

The proposed service is to be limited to a transportation service to be performed under a continuing contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith Ark., and Cain Canning Company, Inc., of Springdale, Ark., hereinafter called Steele, Keystone, and Cain respectively.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 23, 1958 and October 20, 1958, at Kansas City, Mo. Southwest Railroad Association, class I rail carriers in western trunkline territory, and 25 motor carriers¹ oppose the application.

¹ Frisco Transportation Company, Watson Bros. Transportation Company, The Chief Freight Lines Company, East Texas Motor Freight Lines, Inc., and others.

Applicant holds no permanent motor carrier authority. Prior to March 19, 1946, he drove motor vehicles for certain motor carriers, and also repaired Army vehicles. From March 19, 1946 to about January 1, 1953, he owned about two tractors and trailers, and utilized the equipment in the transportation of exempt commodities, between unspecified points. During the period about January 1, 1953 to June 12, 1958, he leased tractor-trailers units to Steele under long-term arrangements. On June 12, 1958, he had nine tractor-trailer units under lease to Steele. Because of a strike at Steele's plants applicant obtained emergency authority for the period June 12, 1958, to July 28, 1958, authorizing the movement (1) of canned goods for Steele from Springdale, Lowell, Fort Smith, and Westville, to Baltimore, Md., Newark, N. J., and various specified points in the other States here involved, (2) of new tin cans and lids for Steele, from Chicago, Ill., Elwood, Ind., Norwood, Ohio, and Houston, Tex., to Springdale and Lowell, and (3) of corrugated fibreboard boxes for Steele, from Monroe, La., and Memphis, to Springdale and Lowell. This authority was extended to September 26, 1958. On July 21, 1958, he obtained temporary authority to serve Steele for a period of 90 days beginning July 28, 1958, in the movement of canned goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above. The temporary has been extended and is now conditioned to expire upon final determination of the issues involved in the instant proceeding.

Applicant has been transporting Steele's traffic under contract. For example, during the period June 14, 1958 to July 16, 1958, when applicant held emergency authority, he transported shipments of canned goods (1) from Springdale and Lowell to Baltimore, Philadelphia, Pa., Charleston, W. Va., Newark, N. J., Denver, Colo., Tucson and Phoenix, Ariz., Tuxedo, Miss., and points in Ohio,

Wisconsin, Minnesota, Iowa, Illinois, Arkansas, Indiana, South Dakota, Kentucky, Missouri, Virginia, North Carolina, South Carolina, Tennessee, Nebraska, (2) from Fort Smith to Richmond and Norfolk, Va., goods, in pool-truck shipments, from the origin points to the destination points mentioned in (1) above, and (3) from Westville to Detroit, Mich., and points in Alabama, Georgia, Illinois, Indiana, and Arkansas. Practically all of these shipments were comprised of freight for delivery at two, three, or four points en route, including points in different States. During the same period he transported (1) shipments of cans and lids (a) from Chicago, Elwood, and Norwood to Springdale, and from Chicago and Elwood to Lowell, (2) five shipments of boxes from Memphis to Springdale, and (3) one shipment of dry beans from Alma, Mich., to Springdale. He proposes to handle similar traffic under contracts with Keystone and Cain. The proposed service, if authorized, will be limited to service for these three shippers.

Applicant has a garage and large parking lot in Springdale. He also has appropriate insurance, and maintains a safety program for the several drivers employed by him. His balance sheet as of June 30, 1958, shows total assets of \$92,902, and total liabilities of \$19,195 and a net worth of \$73,707. He is fit and able, financially and otherwise, properly to conduct the proposed operation.

The application is supported by Steele, Keystone, and Cain. Steele manufactures between 500,000 and 800,000 cases of canned fruits and vegetables yearly at its plant in Lowell, and ships the products from that plant and also from its storage warehouse at Springdale to numerous wholesalers, and retailers, including supermarkets and chain stores at points in the States here involved. Because the customers' orders far exceed the capacity of its plant, it purchases annually (1) between 400,000 and 600,000 cases of canned vegetables from Cain at Spring-

dale, (2) between 300,000 and 500,000 cases of canned vegetables from Keystone at Fort Smith, (3) between 800,000 and 900,000 cases of canned dry beans, and canned pork and beans from Baron Canning Company at Westville, and (4) between 500,000 and 700,000 cases of canned fruits and vegetables from Springdale Canning Company at Springdale. It takes title to the goods at the plants of the suppliers, and selects the carrier for the movement direct to the customers, and also for movement to its warehouse in Springdale and reshipment from that point to customers. On occasion it also purchases canned goods including canned spaghetti, from canneries in the "Ozark area" and other sources of supply, for distribution to customers from Springdale and Lowell. For example, it receives (1) canned kraut from Chiocton, Wis., (2) canned corn from Tripoli, Iowa, (3) canned spaghetti from Belleville, Ill., (4) canned beans from unspecified points in the Rio Grande Valley of Texas, and (5) canned vegetables from Laurel, Miss., Haskell and Muskogee, Okla., Cumberland, Tenn., Gillette and Frederic, Wis., Benton Harbor, Mich., and Alma and Fort Smith, Ark.

Steele also obtains canned tomato paste from several sources of supply in California for use in the manufacture of certain canned goods. In addition, it purchases other materials and supplies at available sources of supply for use in the manufacture, labeling, packaging, and transporting canned goods. It is constantly purchasing the labels used by numerous customers who demand that shipper pickup the labels when it delivers an order of canned goods at the consignee's warehouses so as to have the labels available at shipper's plant for use on the next order made by the customer, and avoid the possibility of delays. The labels used on canned goods sold under Steele's trade name are purchased at Peoria, Ill., Bedford, Va., Omaha, Nebr., Cincinnati, Ohio, and unspecified points. Most of Steele's labels are purchased at Peoria and Omaha. Shipments of the labels range from about

30 pounds to 12,000 pounds in weight. Fresh fruits and vegetables are purchased principally at points within 100 miles of Springdale, and in practically all instances the suppliers in that area make delivery in their own equipment to Steele's warehouse at Springdale. It also has occasion to purchase fresh fruits and vegetables in other areas. It has obtained (1) blackberries from Tyler, Tex., (2) irish potatoes from unspecified points in Florida, Alabama, Colorado, Nebraska, South Dakota and Minnesota, (3) sweet potatoes from unspecified points in Louisiana, Alabama, Tennessee, North Carolina, South Carolina, New Mexico and Texas, (4) dry beans from unspecified points in Michigan, Nebraska, Colorado, Missouri, and California, (5) boysenberries and strawberries from unspecified points in Arkansas, Oklahoma, and Missouri, (6) raw spinach from unspecified points in the Rio Grande Valley, and (7) fresh peas from unspecified points in Texas. In addition to above-mentioned inbound freight, it purchases, (1) caustic soda at Beloco, Tex., (2) salt at Grand Saline, Tex., Rittman, Ohio and Hutchinson, Kans., (3) sugar at several points in Louisiana, principally Shreveport, (4) corrugated boxes at West Monroe, La., Memphis, and Fort Smith, and (5) tin cans and lids at Norwood and Cincinnati, Ohio, Elwood, Chicago, Milwaukee, Wis., Mankato, Minn., Houston, Tampa, Fla., Harvey, La., and Springdale. It obtains title to all inbound materials and supplies at the source of supply, and selects the carrier for the inbound movements. All of the materials and supplies, except fresh fruits and vegetables, are shipped to the plants at Springdale, Lowell, Fort Smith and Westville for use in the manufacture, labeling, and packaging of the canned goods purchased or produced by Steele. The fresh produce moves to Steele's warehouse at Springdale. The inbound traffic, other than labels, moves principally in straight truckloads. In some instances a small volume of labels or cans will move in the same vehicle with other inbound freight including damaged or rejected canned goods. It ships a substantial volume of canned

goods, in straight truckloads, from Springdale, Lowell, Fort Smith and Westville to points in the States here involved. It also ships a substantial volume of this traffic, in pool-loads from the four points mentioned immediately above to numerous points in the States here involved. A pool-load is comprised of small volume orders of several customers, and a pool-shipment requires up to six or more stops en route for delivery to consignees in two or more States. It frequently obtains customers at new locations. At the time of hearing it had canned goods' customers (1) at Newark and Kearney, N. J., and Baltimore, (2) at five points in Pennsylvania, (3) at seven points each in Colorado and Florida, (4) at 10 points each in Nebraska and New Mexico, and (5) at various points in the other States here involved.

Rail service is seldom used because Steele requires prompt motor carrier service for the movement of the inbound and outbound traffic here involved. It is obtaining satisfactory service from the existing motor common carriers on straight truckload shipments of canned goods from and to the points here involved, and the record indicates that some of these motor carriers have provided satisfactory service on some truckload shipments which required stopoffs for delivery of a portion of the freight at one or two points en route to final destination. It depends primarily on Jones Truck Line, Inc., hereinafter called Jones, to pick up this traffic at Springdale, Lowell, Fort Smith and Westville. Jones provides service to authorized destination points, and selects the connecting carriers for joint-line movements to points beyond its authorized territory. Steele will continue using the services of the existing motor carriers on these truckload shipments of canned goods from Springdale, Lowell, Fort Smith and Westlake to destination points.

Steele professes a need for the proposed service on the outbound shipments of canned goods which must be con-

solidated into pool loads and delivered at several points en route, and also on shipments of its inbound traffic the movement of which must be coordinated with shipper's production and shipping schedules on its outbound traffic. The average order of numerous customers who purchase its canned goods, including a large number of consignees located at off-rail points, ranges from 3,000 pounds to 10,000 pounds each. These small-order customers, which have increased substantially since 1948, normally operate on a 10 day supply, and prompt delivery of new orders to replenish the stock must be provided by shipper on specified delivery dates so as to satisfy the demands of the customers and avoid a loss of an account to anyone of several competitors who make prompt delivery of their traffic by private carriage. Because of the competitive situation, and the small profit derived from the sale of a shipment of canned goods, Steele's representative expressed the opinion that shipper would be forced out of business if it had to ship the numerous small orders of canned goods, in less-than-truckload quantities, at less-than-truckload rates, and that successful operation of its business necessitates the movement of this traffic in consolidated loads either by private carriage, or by for-hire motor carriers at truckload rates. Based on information obtained by shippers' representative in his contract with several existing motor carriers in the past several years, he is convinced that none of the existing motor carriers are able to meet shipper's transportation requirements on its inbound traffic, and the numerous outbound shipments of the small-order freight here involved.

In 1948, Steele purchased two tractors and two trailers for use in the movement of the small-order traffic in consolidated loads, which enables it to operate economically and provide prompt delivery service in the same vehicle to several customers en route. As the volume of small orders increased, shipper acquired additional equipment. About January 1, 1958, it was operating 29 tractors and 29 trailers, including nine tractor-trailer units leased from appli-

cant, and it was handling outbound and inbound traffic to and from various points in the States here involved. Because of a strike at the plants, which began about March 1, 1958 and was continuing at the time of last hearing, on October 21, 1958. [sic] Steele's private carrier fleet had been reduced to eight tractor-trailer units on the latter date, and applicant was using nine tractor-trailer units to handle some of shippers inbound and outbound traffic under temporary authority. As shown above, during the period June 14 to July 16, 1958, applicant transported a substantial volume of Steele's small-order traffic in consolidated loads, and some shipments of inbound freight under emergency authority, and at the time of the last hearing he held temporary authority for the movement of shipper's outbound traffic. The service rendered by applicant under emergency and temporary authority is substantially similar to the private carrier operations performed by Steele. Shipper is desirous of discontinuing all private carrier operations, and to utilize applicant as a substitute therefor. It will enter into an appropriate contract with applicant if the authority sought was granted.

Steele's freight has been solicited by several motor carriers. Its representative is unfamiliar with the authorized services provided by some of the opposing motor carriers. He is aware that Wright Motor Lines, and Loving Truck Lines, hereinafter called Wright and Loving, respectively, are authorized to transport the traffic here involved to and from some points in Colorado; however, Steele has not used the service of that carrier chiefly for the reasons that motor carriers now domiciled in the Arkansas area could handle the small volume of traffic shipped by it to and from Colorado points, that about October 3, 1958, Steele's representative contacted an employee of Loving for the purpose of determining whether that carrier could handle a shipment originating at Springdale and consisting of canned goods for customers at Davenport, Iowa.

and Galesburg, Ill., and from his conversation with the carrier's employee he understood that Loving had authority to transport shipper's traffic to and from Colorado points, that it had no interchange arrangements with any motor carriers at Kansas City, and that it was willing to deliver the shipment mentioned above to a connecting carrier at Denver. Routing of the shipment via Denver would be circuitous and impractical. Some shipments made in the past to Colorado points have contained freight for delivery en route at Kansas points. He mentioned situations where some of the opposing carriers would be unable to render complete service on a consolidated shipment of canned goods. For example, he points out that Frisco Transportation Company, hereinafter called Frisco, has no authority to serve Westville, and that shipper has occasion to ship canned goods in the same vehicle from Springdale and Westville to customers at certain points including Ada, Okla., Memphis, Tenn., and points in Texas. Shipper has received some complaints from customers in respect of delays and damages on less-than-truckload shipments of canned goods which moved in joint-line hauls. It prefers single-line service for the movement of all traffic. From his discussions with Jones, and also with Arkansas-Best Freight System, Inc., Campbell Sixty-Six Express, Inc., and M. & A. Transportation Company, hereinafter called Best, Campbell, and M. & A., respectively, shipper's representative has concluded that the only possible way to utilize these carriers for the movement of a substantial volume of the small-order traffic is to ship the freight in less-than-truckload quantities at prohibitive rates;

Cain produces between 500,000 and 600,000 cases of canned vegetables yearly at its plant in Springdale. Prior to the commencement of the strike mentioned above, about 75 percent of the production was sold to and shipped by Steele, and 25 percent was sold to customers who picked up their freight at the plant. Since the strike began, the

volume of sales to Steele has been reduced about 10 per cent, and has resulted in a large excess inventory at Cain's plant. It is willing to provide the volume of canned goods which will be required by Steele in the future; however, it is desirous of selling and shipping a substantial portion of its production to customers at various points in the States here involved so as not to be dependent on one or more large customers for the sale of its canned goods. It recalled that many dealers in canned goods order their supplies in less-than-truckload quantities, that since about June 1, 1958, it had made several shipments in straight truckloads to customers at Chicago, Kansas City, and St. Louis, and that it receives a small volume of inbound freight. Shipper has the conviction that it could not successfully invade the territory here involved if it had to ship its canned goods in less than truckload quantities at less-than-truckload rates, that it would need a motor carrier that is able to handle the small-order traffic in pool loads, that it is unable to obtain the latter type of service from the existing motor carriers, and that applicant should be granted authority to handle its inbound traffic as well as the outbound freight because the inbound payload would enable the carrier to render a better service on the outbound movements. Admittedly, shipper is not very familiar with the services provided by the existing motor carriers. Its plant is not located on a rail siding.

Keystone produces between 400,000 and 500,000 cases of canned vegetables yearly at its plant in Fort Smith. Prior to the commencement of the strike mentioned about 75 percent of its products were purchased and shipped by Steele, and the remaining 25 percent was sold by Keystone and delivered by rail and motor carriers to customers at certain points in the territory here involved. Of the 25 percent mentioned above, 20 percent moved by motor carrier principally in straight truckloads, and 5 percent moved by rail. Its plant is located on a rail sid-

ing. It also purchases and receives fresh vegetables, and a small volume of salt, soda, sugar, cans and boxes. Its vegetables are delivered by the supplier, and the other inbound freight is handled in its own equipment and the facilities provided by the existing carriers.

Because of the strike, Steele has been purchasing between 60 and 65 percent of the plant's production, and Keystone has been selling and delivering a small portion of the excess stock in two new tractors and trailers purchased by it. At the time of hearing it had customers at Birmingham and Montgomery, Ala., Atlanta, Augusta and Savannah, Ga., Jacksonville and Miami, Fla., Carbondale, Kankakee, Peoria, Murphysboro, Springfield and Chicago, Ill., Indianapolis, Bloomington, Terre Haute and Vincennes, Ind., Topeka and Wichita, Kans., Lexington, Paducah, and Russell, Ky., New Orleans, La., Detroit, Jackson, Miss., Kansas City, Springfield, and St. Louis, Mo., Charlotte and Raleigh, N. C., Bellefontaine, Cincinnati, Cleveland, Columbus, Dayton, and Toledo, Ohio, Newark and Jersey City, N. J., Tulsa, Oklahoma City, Pittsburgh, Pa., Greenwood, S. C., Memphis and Nashville, Tenn., Dallas, Richmond, and one or more unspecified points in New York and West Virginia. Prior to June 1, 1958, shipper had not received many small orders; however, it is aware that numerous dealers order less-than-truckload quantities of canned goods from sources of supply, and it is desirous of soliciting and serving the small-order dealers in all States here involved. Shipper expressed the opinion that it would be unable to make single shipments of less-than-truckload traffic, because of the competitive situation and transportation costs; however, if the proposed service were authorized it would make an effort to obtain sales and ship the freight in pooled loads requiring delivery at two or more points en route. Shipper has obtained satisfactory service on shipments transported by the existing motor carriers in straight truckloads and loads requiring one or two stops en route;

however, it has the conviction that these carriers would be unable to provide adequate service on the type of traffic it proposes to ship in pool loads, and that it would be compelled to acquire a number of vehicles for the movement of this traffic in private carriage if the application was denied.

Each of the opposing rail and motor carriers, except Howard J. Nelsen and James Melvin Nelsen, a partnership, hereinafter called Nelsen Brothers, is authorized to operate as a common carrier of the commodities here involved and various other commodities, and each carrier operates a substantial amount of transport equipment. It was stipulated that L. A. Tucker Truck Lines Incorporated, hereinafter called Tucker, of Cape Girardeau, Mo., is operating over regular routes extending from Memphis to St. Louis via Blytheville, Ark., and Cairo, Ill., and from St. Louis to Evansville, Ind., serving intermediate points, that Be-Mac Transportation Company, Inc., hereinafter called Be-Mac, is operating over regular routes extending from Beloit, Wis., and Chicago to various points in Oklahoma, except Westville, serving all intermediate points including St. Louis, and that at the time of hearing Nelsen Brothers held a permit authorizing so far as here pertinent, operation as a contract carrier (1) of canned goods (a) from Nebraska City, Nebr., to points in six States including Arkansas and Oklahoma, (b) between Hamburg, Iowa, and Nebraska City, (c) from Grinnell and Atlantic, Iowa to Nebraska City, and (d) from Kansas City to Council Bluffs, Iowa, and six points in Nebraska.

Wright is authorized, so far as here material, to transport (1) sugar from Torrington, Swink, and Rocky Ford, Colo., to all points in Arkansas and Oklahoma, (2) fresh produce from points in Colorado to points in Arkansas and Oklahoma, and (3) canned goods, (a) from 10 points in Colorado to points in Oklahoma, (b) from Muskogee,

Okla., to points in Colorado, (c) from Springdale and Lowell to points in Colorado, and (d) from Springdale to points in New Mexico on and north of U. S. Highway 66, and those in Nebraska on and west of U. S. Highway 83. Shipments of canned goods moving from Fort Smith and Westville to points in the western portion of Colorado could be interchanged with Loving at Muskogee. It maintains a terminal at Rocky Ford, and operates equipment daily between authorized points. It handles between 6,000,000 and 7,000,000 pounds of canned goods annually for several shippers, including a substantial volume of freight for Welch Grape Juice Company, of Springdale, and has received no complaints. It also transports a substantial volume of the other commodities described above. It has not handled any freight for the supporting shippers; however, it is willing to serve these shippers. In 1953, it solicited Steele and was advised that that shipper was shipping all of its traffic by private carriage. After the application was filed Wright advised Steele by letter or telegram in respect of the availability of its service, and received no response. The handling of shipments which require split-deliveries en route is a common practice of Wright. The carrier concedes that under certain conditions it would not be able to handle a consolidated load of less-than-truckload traffic for Steele. For example, it could not handle a pool shipment of canned goods originating at Westville, Fort Smith, Springdale and Lowell and destined to one or more customers in Missouri, eastern Nebraska and western Nebraska.

Loving is authorized, so far as here pertinent, to tack certain authorities and transport the commodities here involved between points in Oklahoma, Kansas and Arkansas, on the one hand, and, on the other, points in Colorado on and east of U. S. Highway 87. It maintain terminals at Denver and Oklahoma City, and operates equipment daily to and from certain authorized points including those in the Tulsa area. It transports about 400,000

pounds of canned goods a month for certain shippers, including some freight for Welch Grape Juice Company, of Springdale, and provides multiple or split-delivery service. A truckload or a portion of a pooled load of less-than-truckload traffic destined to a point beyond its authorized territory would be interchanged with connecting carriers. For example, freight originating at Springdale and destined to points in the western portion of Colorado could be interchanged with Wright for delivery by the latter. Its representative could not recall any shipments of freight handled for the supporting shippers; however, it is willing to provide service for these shippers on inbound and outbound traffic.

Buckingham Transportation, Inc., Buckingham Express, Inc., and Buckingham Transfer, Inc., hereinafter called the Buckingham companies, are authorized so far as here material, to provide through service in the movement of general commodities, over combined regular and irregular routes extending from Omaha, Nebr., and Kansas City to various points in Illinois, Iowa, Nebraska, Minnesota and North Dakota, and those in the western portion of South Dakota, and several points in Missouri and Colorado, including Denver. They handle both large and small shipments of the type of traffic here involved, including a substantial volume of canned goods, and consistently provide multiple delivery service. Traffic is interchanged with connecting carriers. Freight moving to or from points in the eastern portion of South Dakota is interchanged with a connecting carrier at Sioux Falls, S. Dak. Freight is interlined at Kansas City with Best, Jones, and several other carriers. These carriers are unaware of any traffic handled for the supporting shippers; however, they are desirous of participating with connecting carriers in the movement of the traffic here involved.

Watson Bros. Transportation Co., Inc., hereinafter called Watson, is authorized to transport the commodi-

ties here involved and other traffic over regular routes extending from Minneapolis, Chicago, St. Louis and Kansas City, on the east, to a number of California points, on the west, via Denver, serving intermediate points in Illinois, Iowa, Missouri, Minnesota, Nebraska, Kansas, Colorado, New Mexico and Arizona. It maintains terminals at a number of points including Kansas City and St. Louis. Interchange traffic comprises about 60 percent of its volume of business. It handles the type of traffic here involved and provides multiple drop-off service. Trailers are interlined on shipments of truckload traffic. It has interchanged freight at Kansas City and St. Louis with several carriers including Campbell, M. & A., England Brothers, Frisco, and Jones. It is desirous of participating with these carriers in the movement of the supporting shippers' traffic. Its representative could not recall the last time it handled a shipment of canned goods which required delivery service at four or five points en route.

Frisco is a wholly-owned subsidiary of the St. Louis-San Francisco Railway Company. It is authorized to transport general commodities over regular routes roughly paralleling the rail lines of the railroad. Its routes extend (1) from Springfield, Mo., to a number of points in Missouri including St. Louis and Kansas City, (2) from Springfield to Baxter Springs, Kans., Oklahoma City, and Dallas, Tex., (3) from Springfield to Columbus, Miss., via Memphis, and (4) from Springfield to Alma, Ark., via Lowell and Springdale, serving various intermediate points. It has agents at a number of points including two points within 20 miles of Springdale. It handles the type of traffic here involved, and provides multiple delivery service. It has some idle equipment. It is desirous of serving the supporting shippers. It has no authority to serve Fort Smith or Westville. If a pool load of canned goods originated, for example, at Springdale and

Fort Smith, the freight shipped from the latter point would have to be picked up and delivered to Frisco by another carrier. Moreover, if Frisco were requested to deliver a pooled load consisting, for example, of canned goods moving to several consignees, including about 3,000 or 5,000 pounds for a consignee at a point not served direct by that carrier, the latter portion of the shipment would be transferred to a connecting carrier for delivery by the latter.

Best is authorized to transport general commodities over regular routes extending from a number of points in Ohio, Indiana, Illinois and Missouri, including Kansas City, to Houston and San Antonio, Tex., Greenville, Miss., Shreveport, La., Memphis, and numerous points in Arkansas, serving intermediate points including Fort Smith, Springdale and Lowell. It maintains terminals at several points including Fort Smith and Kansas City. It handles a substantial volume of traffic between authorized points, and interchanges traffic with several connecting carriers at Texarkana, Ark.-Tex., Kansas City, and certain other points. It is desirous of handling the inbound and outbound traffic of the supporting shippers. Admittedly, this carrier could not provide a complete pickup service on a consolidated load of canned goods originating, for example, at Springdale and Westville, because it has no authority to serve the latter point direct. No direct service is provided by Best on traffic shipped from Arkansas points to points in Texas. This traffic is interchanged with connecting carriers at Kansas City or Texarkana. It is aware that canned goods is one of the lowest revenue producing commodities handled by motor common carriers.

East Texas Motor Freight Lines, Inc., hereinafter called Texas Freight, is authorized to transport general commodities over regular routes extending from Chicago to Houston, San Antonio, Fort Worth, and Port Arthur, Tex., and Shreveport, via Memphis, Little Rock, and Tex-

arkana. It maintains terminals at several points including Dallas, Texarkana, St. Louis, and Little Rock, and has several pieces of equipment stationed at each terminal. It operates daily schedules, and transports truckload and less-than-truckload shipments of canned goods and other freight. Traffic moving to and from Springdale, Westville, and Texas points is interchanged at Texarkana with several carriers including Best. Trailers are interlined with Best and other carriers. It is also able to interchange inbound and outbound shipments of the supporting shipper's traffic with several carriers, including Best and Jones, at St. Louis, and with Jones at Little Rock. It offers, for example, second-morning delivery service from St. Louis and Memphis to Texas points. Its equipment is not operating to capacity. Some heavy loading freight is loaded and transported in the same vehicle with light loading freight, including tin cans, so as to increase the pay load. It is desirous of participating in the movement of the supporting shippers' traffic.

Gillette Motor Transport, Inc., and its affiliate Western Truck Lines, Inc., hereinafter called Gillette and Western, respectively, operate a combined through service in the movement of general commodities over regular routes extending from Kansas City to a number of points in California via Dallas, and El Paso, Tex., serving intermediate points. These carriers have no authority to serve Westville or any point in Arkansas direct; however, they are able and willing to participate with connecting carriers, principally Jones at Dallas, in the movement of the supporting shippers traffic. They operate daily schedules, and offer, for example, first-morning delivery service from Dallas to El Paso, and second-morning service from Dallas to points in Arizona and California. Their equipment is not operating to capacity.

Western Pacific Railroad Company, hereinafter called W. P., operates over rail lines extending for [sic] Salt Lake

City, Utah, to San Francisco and San Jose, Calif., via Elko, Nev. The Denver and Rio Grande Western Railroad Company, hereinafter called D.R.G., operates over rail lines extending from Denver and Pueblo, Colo., to Salt Lake City. Great Northern Railway Company, hereinafter called G.N., operates over rail lines extending from Yankton, S. Dak., Sioux City, and Chicago to points in Oregon and Washington via Minot, N. Dak. The Atchison, Topeka and Santa Fe Railway Company, hereinafter called Santa Fe, operates over rail lines extending from Chicago to points in California, Arizona, New Mexico, Texas, Louisiana and Colorado, serving intermediate points. These rail carriers operate freight schedules daily and provide drop-off service en route, and traffic is interchanged between these carriers and with other rail carriers. G.N. offers, for example, one-day service from Sioux City to points in Minnesota, North Dakota and Wisconsin, and Santa Fe offers, for example, next-morning delivery service from Dallas to El Paso, Tex., and second-morning service to points in Arizona and California. In 1957, Santa Fe participated in the movement of 19 carloads of canned goods from points in Arkansas and Oklahoma to California points, and 609 carloads of canned goods from points in California to points in Arkansas and Oklahoma. During the same period, W.P. participated in the movement of 41 carloads of canned goods from points in California to points in Arkansas, and one carload of beans, 20 carloads of canned goods, and 29 carloads of sugar from points in California to points in Oklahoma. They have experienced a decline in traffic, despite large expenditures in operating facilities. These carriers have no authority to service Westville or any point in Arkansas; however, they are desirous of participating with connecting carriers in the movement of the inbound and outbound traffic of the supporting shippers.

As seen, Steele is shipping a substantial amount of canned goods from Springdale, Lowell, Fort Smith and

Westville to a number of points in the States here involved. Some of this traffic is obtained from Cain at Springdale, and from Keystone at Fort Smith. It also ships tin cans and lids, can labels, salt, sugar, caustic soda, corrugated boxes, canned goods, and fresh fruits and vegetables from, various sources of supply in the territory here involved to the four origin points described above. A substantial number of Steele's customers order canned goods in small less-than-truckload quantities, and since about 1948 Steele has been transporting the small-order freight in pool loads, in private carriage, and each shipment requires stops for delivery at several points en route. Its equipment is also used for the movement of inbound freight. Since about June 1, 1958, shipper has also been using applicant under emergency and temporary authority for the movement of a portion of the small-order traffic and some inbound freight. Shipper's use of private carriage, and the service provided by applicant under emergency and temporary authority is based on its conviction that rail service is too slow and is otherwise unsatisfactory for the movement of any traffic handled by shipper, and that the existing motor carriers are unable to meet its transportation requirements on the pooled loads of the outbound traffic and on the inbound freight.

Since about June 1, 1958, Cain has made some shipments of canned goods from Springdale to customers at Chicago, Kansas City, and St. Louis, and it has received some inbound freight at its plant. If the proposed service were authorized, Cain would make an effort to sell and ship a substantial volume of canned goods to small-order customers in the States here involved. At the time of hearing, Keystone was shipping a fairly substantial volume of canned goods from its plant at Fort Smith to points in a number of States here involved, and it was receiving some inbound freight. If the proposed service were authorized, shipper would expand its sales efforts

in the States here involved, primarily in respect of small-order traffic. Cain and Keystone also have the conviction that the existing rail and motor carriers are unable to provide adequate service on shipments of the small-order traffic.

True, the opposing rail and motor carriers operate daily between points in a portion of the territory here involved; however, the record indicates that the proposed service will be more responsive to shipper's transportation requirements. All things considered, the examiner concludes that the evidence warrants a grant of authority to the extent hereinafter indicated, and it does not appear that such a grant will have any material adverse affect [sic] upon the operations of any other carrier.

The examiner finds that operation in interstate or foreign commerce by applicant as a contract carrier by motor vehicle, over irregular routes, under a continuing contract or contracts with Steele Canning Company, of Springdale, Ark., Keystone Packing Company, of Fort Smith, Ark., and Cain Canning Company, Inc., of Springdale, Ark., of the commodities described and in the manner described in appendix A hereto, will be consistent with the public interest and the national transportation policy; that applicant is fit, willing, and able properly to perform such service and to conform to the requirements of the Interstate Commerce Act and the Commission's rules and regulations thereunder; that a permit authorizing such operations should be granted; and that the application in all other respects should be denied.

In view of the findings herein, the examiner recommends that the appended order be entered.

By H. L. Hanback, Hearing Examiner.

(Signature) H. L. Hanback

APPENDIX A

- (1).—Canned goods, from Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., to points in Alabama, Arizona, Arkansas, California, Colorado, Florida, Georgia, Illinois except Chicago, Ill., Indiana, Iowa, Kansas except Wichita, Kans., Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri except St. Louis, Kansas City, Springfield, and Joplin, Mo., Maryland, Nebraska, New Jersey, New Mexico, North Carolina, South Carolina, North Dakota, South Dakota, Ohio, Oklahoma except Oklahoma City and Tulsa, Okla., Pennsylvania, Tennessee except Memphis, Tenn., Texas except Dallas and Fort Worth, Tex., Virginia, West Virginia, and Wisconsin, over irregular routes.
- (2).—Canned goods, and materials and supplies used in manufacturing, labeling, packing, and transporting canned goods, from the destination points described in (1) above, except those in Virginia, West Virginia and Wisconsin, to Springdale, Lowell and Fort Smith, Ark., and Westville, Okla., over irregular routes.
- (3).—Tin cans and lids from Chicago, Ill., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.
- (4).—Corrugated fibreboard boxes, from Memphis, Tenn., to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., over irregular routes.

RESTRICTIONS:

The operating authority described above shall be limited to a transportation service to be performed under a continuing contract or contracts (a) with Steele Canning Company, of Springdale, Ark., on

traffic moving from and to Springdale, Lowell, and Fort Smith, Ark., and Westville, Okla., (b) with Keystone Packing Company, of Fort Smith, Ark., on traffic moving from and to Fort Smith, and (c) with Cain Canning Company, Inc., of Springdale, Ark., on traffic moving from and to Springdale.

**Recommended by H. L. Hanback,
Hearing Examiner.**

(Signature) H.L. Hanback

No. MC-117391

HAROLD D. MCCOY.
Secretary.

(SÉAL.)